Chicago-Kent Law Review

Volume 43 | Issue 2 Article 2

October 1966

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CHICAGO-KENT LAW REVIEW

VOLUME 43 FALL, 1966 NUMBER 2

SIXTY YEARS OF COMPULSORY EUGENIC STERILIZATION: "THREE GENERATIONS OF IMBECILES" AND THE CONSTITUTION OF THE UNITED STATES

CHARLES P. KINDREGAN*

> It is . . . the policy of the state to prevent the procreation and increase in number of feebleminded, insane and epileptic persons, idiots, imbeciles, moral degenerates, and sexual perverts likely to become a menace to society.[1]

SINCE 1907 almost seventy-thousand persons[2] have been compulsorily sterilized in the United States under a theory that they constitute a threat to society. This practice is based on the theory of eugenics, first propounded by Sir Francis Galton in 1883. Eugenics developed from the belief that human defects are transmissible from parents to children so that the improvement of the race requires the sterilization of defective persons. The theory was implemented by the convictions of the eugenicists that defective human beings breed more frequently than normal persons and thereby threaten to flood society with inferior, criminal and unproductive children. Among the defects which the early eugenicists proposed to eliminate through sterilization were feeblemindedness, insanity, criminal tendencies, epilepsy, inebriation, drug addiction, tuberculosis, syphilis, blindness, deafness, physical deformities, unproductive dependency such as pauperism, economic failure and orphanism.[3]

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1 Mich. Comp. Laws ch. 720, § 301 (1948).

2 Based on statistics collected and published by the Human Betterment Association of America.

3 Defects listed in the Model Eugenic Sterilization Law proposed in Eugenic Sterili-

The eugenic theory gained great popularity in the United States at the beginning of the twentieth century, and interest in it was increased by its widespread elaboration in magazines and lectures. Combined with the popularity of ideas about familial degeneracy and case studies of such notorious blood lines as the Jukes, the Nams and the Kallikaks, the period between 1900 and 1937 witnessed a rising demand that the goals of eugenics be enforced through legislation. In 1905 the legislature of Pennsylvania passed a compulsory eugenic sterilization bill (hereafter referred to as CES), but Governor Pennypacker vetoed it. Indiana became the first state to authorize CES in 1907; Washington adopted it a few months later.[4] Twenty-nine states subsequently approved CES; twenty-five states currently permit CES.[5]

The provisions of these CES statutes now in force will be examined in relation to constitutional questions which courts and commentators have asked about such statutes. These questions have not been raised in an appellate court since 1942, but the absence of cases does not mean that the questions have been answered to the satisfaction of the legal community. Although some may feel that the constitutionality of CES is ". . . . no longer a debatable issue so long as procedural safeguards such as notice, hearing, and judicial review are provided for and observed,"[6] the overwhelming number of legal commentators see constitutional difficulties of a substantive nature in the CES statutes.[7] Inasmuch

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zation in the United States (1922), quoted by Montagu, Human Heredity 257 (paperback edition, 1960).

[4] Both statutes were subsequently held unconstitutional. Williams v. Smith, 190 Ind. 526, 131 N.E. 2 (1921); *In Re* Hendrickson, 12 Wash. 2d 600, 123 P.2d 322 (1942).

[5] Alabama, Arizona, California, Connecticut, Delaware, Georgia, Idaho, Indiana, Iowa, Maine, Michigan, Mississippi, Montana, Nebraska, New Hampshire, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Utah, Virginia, West Virginia, and Wisconsin. Adverse judicial determinations in Nevada, New Jersey, New York and Washington caused those states to abandon CES. The legislature of Kansas recently became the first to totally repeal a CES law without the pressure of an adverse court holding, Sess. Laws of Kan. ch. 477, § 1 (1965). Two states, Vermont and Minnesota, permit voluntary eugenic sterilization; VES is outside the scope of the present study. Eugenic sterilization is illegal, and frequently criminal, in twenty-three states; exceptions to the latter statement may be Ohio and Maryland, where some case law allowing a probate court to order a eugenic sterilization exists.

[6] 61 Mich. L. Rev. 1359, 1360 (1963).

[7] See Bligh, *Sterilization and Mental Retardation*, 51 A.B.A.J. 1059 (1965); Kalven, *A Special Corner of Civil Liberties*, 31 N.Y.U.L. Rev. 1234 (1965); O'Hara and Sanks, *Eugenic Sterilization*, 45 GEO. L.J. 20 (1956); Zenoff, *Reappraisal of Eugenic Sterilization Laws*, 10 Clev.-Mar. L. Rev. 149 (1961); 38 Ind. L.J. 275 (1963); 35 Iowa L. Rev. 253 (1950); 15 Syracuse L. Rev. 738 (1964).

as hundreds of persons will be ordered to submit to a vasectomy or salpingectomy[8] during the coming year, a court may soon have to examine CES in the light of contemporary scientific knowledge and recent legal developments.

CES and Cruel and Unusual Punishment

Is the sterilization of a defective person a cruel and unusual punishment within the prohibition of the eighth amendment of the Constitution of the United States and similar prohibitions in the constitutions of the diverse states?[9] Whether sterilization is inherently cruel was first asked in *State v. Feilen.*[10] A criminal defendant had been sentenced to undergo a sterilization following his conviction on a charge of statutory rape. The defendant argued that sterilization was in itself a cruel punishment,[11] and thus was beyond the constitutional power of the state. The Supreme Court of Washington, however, held that since the state could have imposed the death penalty for the defendant's brutal and revolting crime it could certainly require him to submit to a lesser penalty such as vasectomy. Cruelty was equated with torture, and sterilization was not torture.

A directly opposite result was reached in a 1914 case, *Davis v. Berry.*[12] The Iowa statute required the sterilization of twice-convicted felons, a punitive measure with eugenic underpinnings. The

8 Several CES statutes require the use of these operations. Vasectomy is a cutting of the vas deferens in the male; salpingectomy is a cutting or tying of the fallopian tubes in the female. Both are reversible in theory, but fecundity cannot always be restored in fact. Statutes not specifying these operations would probably allow hysterectomy (removal of the uterus), oophorectomy (removal of the ovaries), or use of some treatment such as radiation. All of these would be final.

Neb. Rev.-Stat. ch. 83, §§ 501-509 (1956), would probably allow castration of males. Cal. Wel. & Inst. Code, § 6624 (1937), forbids castration for eugenic purposes, but Cal. Pen. Code, § 2670 (1960), would probably allow it when its purpose is both punitive and eugenic. All other states forbid castration.

An objection to one form of sterilization as distinguished from another has never been raised in an appellate court. Failure to specify whether a sterilization was to be by vasectomy or castration was fatal to a CES order in *Davis v. Walton*, 74 Utah 80, 276 Pac. 921 (1929).

9 The constitutions of all CES states forbid cruel and unusual punishment except the Constitution of Connecticut. The presence or absence of the prohibition in a state constitution is not important since the standards of the Eighth Amendment to the United States Constitution have been applied to the states through the Fourteenth Amendment. Robinson v. California, 370 U.S. 660, 82 Sup. Ct. 1417 (1962).

10 70 Wash. 65, 126 Pac. 75 (1912).

11 The Constitution of Washington forbade only cruel punishment.

12 216 Fed. 413 (S.D. Iowa 1914).

plaintiff sought to enjoin the enforcement of an order for his sterilization under this provision. A federal district court issued the injunction, holding that the forced submission to an operation of vasectomy would constitute a cruel and unusual punishment under the Constitution of the United States. The decision noted that the prohibition against cruel and unusual punishments originated in the English Bill of Rights of 1688. The fact that castration, which had been commonly used as a punishment before 1688, was never used in England after the Bill of Rights indicates that it was considered cruel and unusual. The court admitted specific differences between sterilization by vasectomy and castration, but felt that since both evoke the same shame, humiliation, degradation and mental torture by forced surrender of manly biological power, the differences were more of degree than kind.

The decision in the *Davis* case was followed by another federal district court in *Mickle v. Henrichs*.[13] The plaintiff, an epileptic, had been convicted of rape in Nevada. The sentencing judge ordered him sterilized under a CES statute. An injunction against the enforcement of the order was issued, the court holding that such a sterilization would violate the prohibition of cruel and unusual punishment contained in the Nevada Constituton. The court rejected the lesser penalty argument which had been accepted by the court in *State v. Feilen*[14]:

> . . . . If life is spared, it should not be unnecessarily obstructed . . . for him and society, a fair opportunity to retrieve his fall is quite as important as the eugenic possibilities of sterilization.[15]

Thus, for the first time, the question of whether CES could be punitive, and as punishment be cruel and unusual, was answered in the affirmative. The court held that a cruel and unusual punishment cannot be exacted under ". . . . theories of race culture."[16] However, dictum in a contemporaneous New York decision stressed that sterilization under a CES statute could not be cruel and unusual punishment because there was no punitive intent.[17]

13 262 Fed. 688 (D. Nev. 1918).
14 *Supra* note 10.
15 *Supra* note 13, at 691.
16 *Supra* note 13, at 688.
17 Osborn v. Thomson, 185 App. Div. 902, 171 N.Y. Supp. 1094 (1918), *affirming In Re* Thomson, 103 Misc. 23, 169 N.Y. Supp. 638 (Sup. Ct. 1918).

In 1925, the Supreme Court of Michigan became the first American court to uphold a eugenic sterilization order against the argument that it constituted cruel and unusual punishment:

> . . . . Under the existing circumstances it was not only [the state's] . . . right, but its duty to enact some legislation that would protect the people and preserve the race from the known effects of the procreation of children by the feebleminded, the idiots, and the imbeciles.[18]

Four years later a prisoner in the Utah penitentiary was ordered sterilized after being discovered in an act of sodomy in his cell. The Supreme Court of the state upheld an injunction against the order on the grounds that an isolated act of moral degeneracy would not reasonably indicate that the man would produce inadequate offspring.[19] Language in the decision indicated that the court felt an ostensibly eugenic sterilization was being administered as punishment. In 1931, the Supreme Court of Idaho held that the sterilization of an imbecile, whose father and eleven brothers and sisters were feebleminded, was not punitive and therefore could not be a cruel and unusual punishment.[20] A contemporaneous Nebraska decision reached the same conclusion, but strongly worded dicta made clear the court's belief that a separate provision of the statute allowing the sterilization of habitual criminals and sexual perverts was contrary to the cruel and unusual punishment prohibition.[21] The cruel and unusual punishment argument was rejected in an Oklahoma decision in 1933[22] and in an advisory opinion given to the Governor of Alabama by the Supreme Court of that state two years later.[23]

Whether CES is a cruel and unusual punishment is still an open question. There particularly is doubt about the status of statutes which call for sterilization of criminals on eugenic grounds. The two decisions which enjoined sterilization orders on the grounds that they constituted cruel and unusual punishments involved convicted felons.[24] Several of the decisions in which no eighth

18 Smith v. Command, 231 Mich. 409, 414, 204 N.W. 140, 142 (1925); a similar conclusion was reached in *In re Salloum*, 236 Mich. 498, 210 N.W. 478 (1926).

19 Davis v. Walton, 74 Utah 80, 276 Pac. 921 (1929).

20 State v. Troutman, 50 Idaho 673, 299 Pac. 668 (1931).

21 Clayton v. Board of Examiners of Defectives, 120 Neb. 680, 234 N.W. 630 (1931).

22 *In Re* Main, 162 Okla. 65, 19 P.2d 153 (1933).

23 *In Re* Opinion of the Justices, 230 Ala. 543, 162 So. 123 (1935).

24 Davis v. Berry, 215 Fed. 413 (S.D. Iowa 1914); Mickle v. Henrichs, 262 Fed. 688 (D. Nev. 1918).

amendment violations were found were expressly limited by the courts to the sterilization of non-criminal defectives.[25]

Eight states currently make criminality grounds for CES. Delaware permits the sterilization of any person convicted of three felonies if his criminality is caused by a mental abnormality or disease.[26] Connecticut permits the sterilization of any prisoner who has an inheritable tendency to crime.[27] Idaho, Iowa, Nebraska and North Dakota sterilize moral degenerates, sexual perverts and habitual criminals.[28] Utah permits the sterilization of any person in the state who is afflicted with habitual, degenerate, sexual, criminal tendencies.[29] California sterilizes any prisoner who has been convicted twice of rape, attempted rape or seduction; or any prisoner who has been convicted three times of any other crime and gives evidence of being morally or sexually degenerate or perverted; or anyone who is under a life sentence and shows continuing evidence of moral or sexual depravity.[30] None of these statutes has so far been tested in relation to eighth amendment standards.

All twenty-five CES statutes allow the sterilization of non-criminal defectives. Eighth amendment objections to these provisions are not so strong, and no appellate court has ever held the sterilization of a mental defective or epileptic to be a cruel and unusual punishment unless he was also a convicted felon. Nevertheless, recent legal developments indicate that the courts may be receptive to the argument in the future. The eugenic advocates see people who are mentally or physically inferior as dangerous aggressors against society. The CES statutes are worded in terms

25 Osborn v. Thomson, 185 App. Div. 902, 171 N.Y. Supp. 1094 (1918); State v. Troutman, *supra* note 20; Clayton v. Board of Examiners of Defectives, *supra* note 21.

26 Del. Code tit. 16, §§ 5701-5705 (1953).

27 Conn. Gen. Stat. tit. 17, ch. 299, §§ 17-19 (1958).

28 Idaho Code tit. 66, §§ 801-812 (1947); Iowa Code ch. 145, § 1022 (1946); Neb. Rev. Stat. ch. 83, §§ 501-509 (1956); N.D. Cent. Code tit. 23, §§ 0801-0815 (1960).

29 Utah Code Ann. tit. 64, ch. 10, §§ 1-14 (1953).

30 Cal. Pen. Code tit. 1, § 2670 (1960). Although this is part of the Penal Code, and separate from the CES provision found in Cal. Wel. and Inst. Code, § 6624 (1937), the statute is eugenic rather than punitive in form. However, California does have an expressly punitive sterilization statute which applies to those convicted of carnal abuse of a child under ten years of age. Cal. Pen. Code tit. 45, § 645 (1960). Nebraska also has a statute allowing sterilization, in the form of castration, of males convicted of rape, incest, or crimes against nature. Neb. Rev. Stat. ch. 83, § 504 (1956). Although it is not clear from the Oregon Revised Statutes of 1965 if the penal sterilization provision previously found in Ore. Comp. Laws tit. 127, §§ 801-811 has been repealed, no reference to sterilization as a punishment appears in the new codification.

of protecting the commonweal against the procreative powers of such persons.[31] This is not criminal in form, but in the light of *Robinson v. California,*[32] the intent of the CES statutes approaches a theory of criminality. In *Robinson* the Supreme Court of the United States determined that it was cruel and unusual punishment when the state imprisons a man for the psuedo-crime of being a narcotics addict. The fact that an addict may be a threat to society does not give the state the right to imprison him. A conditon is not a crime. Mr. Justice Douglas, for the majority, indicated that it is cruel and unusual punishment for the state to punish a man for being addicted to narcotics, and by way of dictum added that the same would be true of any attempt to punish a man because he was mentally deficient. The line between punishment and non-punishment in *Robinson* was so vague that Mr. Justice Clark's dissent was premised on the conclusion that California was attempting to cure rather than penalize the defendant. The line may be equally difficult to draw in a CES case.

The United States Supreme Court has recently determined that the state may invade the body of a man in order to remove a blood sample when he is suspected of driving an automobile while intoxicated, but noted the extreme limitations placed on the state when it is dealing with the bodily integrity of its subjects:

> . . . . The integrity of an individual's person is a cherished value of our society. That we today hold the constitution does not forbid minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions.[33]

Sterilization is unquestionably a substantial intrusion into a fundamental function of the human body.[34] When the state undertakes

31 Ala. Code tit. 45, § 243 (1958), and Cal. Wel. & Inst. Code, § 6624 (1937), state no express grounds on which the CES order is to be based.

32 370 U.S. 660, 82 Sup. Ct. 1417 (1962).

33 Schmerber v. California, —— U.S. ——, 86 Sup. Ct. 1826, 1836 (1966). The Court was dealing with a self-incrimination problem.

34 In depriving a man of the use of procreative power, the form of bodily intrusion is of a totally different character than forced vaccination. However, Mr. Justice Holmes maintained that ". . . . the principle that sustains compulsory vaccination is broad enough to cover cutting the fallopian tubes." Bell v. Buck, 274 U.S. 200, 208, 47 Sup. Ct. 584, 585 (1925). The comparison has been harshly criticized by legal commentators. Mr. Justice Douglas has verbalized the substantial character of the bodily intrusion in sterilization when he described it as leaving the individual with ". . . . no redemption. . . ." Skinner v. Oklahoma, 316 U.S. 535, 541, 62 Sup. Ct. 1110, 1113 (1942).

this intrusion under a theory of protecting itself from a condition in its defective subject, it approaches very close to the kind of punishment rejected by the Supreme Court as cruel and unusual in *Robinson v. California.*[35] Unlike narcotics addict Robinson, the mental or physical defective is not labeled a criminal by the CES statute. But because his condition is seen as an anti-social threat he is forced to surrender a human right which is more fundamental than the ninety days of freedom of which California attempted to deprive narcotics addicts. Can a state escape the force of the cruel and unusual prohibition by simply denominating its deprivations as eugenic rather than punitive?

CES and Equal Protection of the Laws

Is CES a denial of equal protection of the law under the fourteenth amendment of the Constitution of the United States? This has been the most thoroughly litigated constitutional question affecting CES. It was a key question in the two CES cases determined by the Supreme Court of the United States. In *Skinner v. Oklahoma,*[36] the court held an order for the sterilization of a prisoner to be a denial of equal protection. Jack Skinner had been convicted once of stealing chickens and twice of robbery. The Oklahoma statute provided for the eugenic sterilization of habitual criminals who had twice been convicted of felony involving moral turpitude. Mr. Justice Douglas spoke for a unanimous court in holding that this denied Skinner equal protection of the law inasmuch as Oklahoma classified his crimes as involving moral turpitude while excluding embezzlement from the classification. To impose sterilization on a chicken stealer and robber, while exempting the embezzler whose thievery might be much greater, was a denial of the equality of protection required of the states by the fourteenth amendment.

A different dimension of equal protection under a CES statute was presented in an earlier Supreme Court decision, *Bell v. Buck.*[37] The Virginia statute provided for the forced sterilization of feebleminded persons confined in state institutions but did not cover such persons at large in the state. It was argued that this was a

[35] *Supra* note 32.
[36] 316 U.S. 535, 62 Sup. Ct. 1110 (1942).
[37] 274 U.S. 200, 47 Sup. Ct. 584 (1925).

failure to apply the eugenic remedy to all the members of the class to which it should apply and therefore constituted a denial of equal protection to feebleminded persons held in state institutions. Mr. Justice Holmes, for the majority, noted that such an argument is ". . . . the usual last resort of constitutional arguments."[38] Attacking the merits of the argument he admitted that perfect equality did not exist under the law, but held that the statute aimed at equality inasmuch as the sterilization of inmates would allow many of them ". . . . to be returned to the world, and thus open the asylum to others."[39]

The argument dismissed by Mr. Justice Holmes as a last resort had actually prevailed in three state supreme courts prior to the decision in *Bell.* In *Smith v. Board of Examiners,*[40] an epileptic confined to a state hospital was ordered to submit to a salpingectomy. She successfully argued in the Supreme Court of New Jersey that the omission of epileptics not confined in state institutions from the ambit of the statute constituted a denial of equal protection to epileptics who were so confined. The court noted that the exclusion of epileptics not confined to state institutions was unreasonable and arbitrary since they were the defectives who were most likely to have children. The Supreme Court of Michigan and the New York Court of Appeals reached similar conclusions in judging statutes which failed to include extra-institutional provisions.[41] However, every case in point decided after *Bell* concluded that inapplicability to non-institutionalized persons does not violate the fourteenth amendment.[42]

Currently, seven states bring all persons at large in the state under the provisions of the CES statute.[43] One state has a statute which is extra-institutional as to all feebleminded persons, but

38 *Id.* at 208, 47 Sup. Ct. at 585.

39 *Ibid.*

40 85 N.J.L. 46, 88 Atl. 963 (1913).

41 Osborn v. Thomson, 185 App. Div. 902, 171 N.Y. Supp. 1094 (1918), *affirming In Re* Thomson, 103 Misc. 23, 169 N.Y. Supp. 638 (Sup. Ct. 1918); Haynes v. Lapeer, 201 Mich. 138, 166 N.W. 930 (1918).

42 State v. Troutman, 50 Idaho 673, 299 Pac. 668 (1931); State v. Schaffer, 126 Kan. 607, 270 Pac. 604 (1928).

43 Del. Code tit. 16, §§ 5701-5705 (1953); Idaho Code tit. 66, §§ 801-812 (1947); Iowa Code ch, 145, §§ 1-22 (1946); Me. Rev. Stat. tit. 34, §§ 2461-2468 (1964); N.C. Gen. Stat. ch. 35, §§ 35-57 (1949); Ore. Rev. Stat. tit. 36, ch. 436, §§ 010-150 (1965); Utah Code Ann. tit. 64, ch. 10, §§ 1-14 (1953).

covers only the institutionalized suffering from mental diseases, sexual perversion or syphilis.[44] The remaining seventeen CES states have no extra-institutional provisions.[45]

Another aspect of the equal protection question was raised in *Smith v. Command.*[46] A Michigan statute allowed the sterilization of feebleminded persons, but did not provide for the insane. The court held that this did not violate equal protection because the distinction between the two classes was reasonable. Twenty-three CES states currently permit the sterilization of both the feebleminded and the insane.[47] The court in *Smith* did find a portion of the statute violative of equal protection inasmuch as it applied CES only to defectives whose children would probably become wards of the state. This was held to constitute an unreasonable sub-class within a class.[48] Although the probability that children of the defective may become dependant on state aid is frequently one of the factors on which a CES order can be based none of the current CES statutes limit their applicability to such a class.

CES AND SUBSTANTIVE DUE PROCESS

Does CES violate the fourteenth amendment of the Constitution of the United States by denying substantive due process? If the policy embodied in the CES statutes is unsound then steriliza-

44 S.D. Code tit. 30, §§ 0501-0514 (1939).

45 One of the seventeen has a seperate statute which achieves a degree of extra-institutionality in CES. Neb. Rev. Stat. ch. 42, § 102 (1956), requires the sterilization of all persons who have been adjudicated feebleminded or imbecilic, or who have a condition of hereditary insanity or epilepsy, as a condition precedent to marriage in Nebraska.

46 231 Mich. 409, 204 N.W. 140 (1925).

47 The exceptions are Georgia and Maine. Ga. Code Ann. tit. 99, §§ 801-012 (1953), includes "hereditary mental illness" but makes no mention of feeblemindedness. The reverse is true in Me. Rev. Stat. tit. 34, §§ 2461-2468 (1964). This covers only feeblemindedness and would seem to exclude an illness such as insanity. The general term "mental deficiency" used in Neb. Rev. Stat. ch. 83, §§ 501-509 (1956), would seem to include both insanity and feeblemindedness, as would "mental defectives" used in Ala. Code tit. 45, § 243 (1958), and Mich. Comp. Laws ch. 720, §§ 301-310 (1948). The remaining CES statutes distinguish and include both the insane and the feebleminded, some using the equivalent terms mental illness and mental deficiency. Ore. Rev. Stat. tit. 36, ch. 436, §§ 010-150 (1965), is the only statute which uses the correct terms, "mental illness and mental retardation."

Ariz. Rev. Stat. tit. 36, §§ 531-540 (1956), Del. Code tit. 16, §§ 5710-5705 (1953), Ind. Stat. Ann. tit. 22, §§ 1601-1618 (Burns 1964), Miss. Code Ann. tit. 25, §§ 6957-6964 (1942), N.H. Rev. Stat. Ann. tit. XII, ch. 147, §§ 1-14 (1955), S.C. Code tit. 32, §§ 671-672 (1962), and W. Va. Code ch. 16, §§ 1394-1400 (1961) include only that form of insanity which is recurrent and hereditary. S.D. Code tit. 30, §§ 0501-0514 (1939), lists only that insanity which is an "inheritable mental disease."

48 The clause being separable, the entire statute was not held unconstitutional.

tions ordered under them would be an unreasonable exercise of the police power. In this perspective the theory of eugenics becomes critical to an analysis of the constitutional status of CES. This was recognized in the early litigation of CES cases, and a substantial amount of attention was given to scientific opinion in the first decisions on the subject. The cases were determined on other considerations, the courts being reluctant to approve or disapprove the scientific learning of the legislatures, but serious doubts about eugenics were at first expressed by the judiciary. *Smith v. Command*[49] was the first case in which a court clearly expressed a conviction that the eugenic theory was certain enough to support CES legislation:

> . . . . Measured by its injurious effect upon society, what right has any class of citizens to beget children with an inherited tendency to crime, feeblemindedness, idiocy, or imbecility?[50]

It remained for the Supreme Court of the United States, within a few months of the decision in *Smith*, to verbalize the law's acceptance of the eugenic theory in *Bell v. Buck*.[51] Carrie Buck was an eighteen-year-old imbecile confined to a Virginia state mental hospital. Her mother and illegimate daughter were also imbeciles.[52] An order for her sterilization was upheld by the Supreme Court of Virginia.[53] Speaking for the majority[54] in the United States Supreme Court, Mr. Justice Holmes based the court's affirmation squarely on the reasonableness of the eugenic theory:

> . . . . The attack is not upon the procedural but upon the substantive law . . . . we have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the state for these lesser sacrifices, often felt not to be such by

49 *Supra* note 46.

50 231 Mich. 409, 421, 204 N.W. 140, 149 (1925).

51 274 U.S. 200, 47 Sup. Ct. 584 (1925).

52 The statement of facts by the Court has been challenged by a sociologist who claims to have made an investigation of the case. Dr. J. E. Coogan claims that Carrie and her mother were morons and were thus considerably more intelligent than imbeciles. He disputes the "three generations of imbeciles are enough" rhetoric of Mr. Justice Holmes on the grounds that the third generation, Carrie's daughter, was probably above average in intelligence. As to her alleged imbecility, this judgment was made by a nurse who observed her at one month of age. Her subsequent school record indicates that she was a bright child. See Coogan, *Eugenic Sterilization*, The Catholic World 45 (April 1953). Coogan's study at least indicates the kind of factual morass which can confront a court in a CES case.

53 143 Va. 310, 130 S.E. 516 (1925).

54 Mr. Justice Butler dissented but did not file an opinion.

> those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . [T]hree generations of imbeciles are enough.[55]

So comprehensive was the court's approval of the eugenic theory that the scientific basis of CES has rarely been challenged in court since 1925. In 1928 the Supreme Court of Kansas cited *Bell* as precluding an argument that CES violated substantive due process.[56] Three years later the Supreme Court of Idaho would not even allow itself a doubt about the validity of the eugenic theory:

> . . . . [There is] no doubt in our minds that heredity plays a controlling part in the blight of feeblemindedness. If there be any natural right for natively mental defectives to beget children, that right must give way to the police power of the state in protecting the common welfare.[57]

This is not to say that the legal community has accepted the eugenic theory as a reasonable basis for CES legislation.[58] The concurring opinion of Mr. Justice Jackson in *Skinner v. Oklahoma* verbalized the doubts of many legal commentators:

> . . . . I think also the present plan to sterilize the individual in pursuit of a eugenic plan to eliminate from the race characteristics that are only vaguely identified and which in our present state of knowledge are uncertain as to transmissibility presents constitutional questions of gravity.[59]

The doubts expressed by Mr. Justice Jackson were caused by the retreat which biologists and researchers had made from the sweeping generalizations about heredity prevailing in the early twentieth century. In 1936 the American Neurological As-

[55] *Supra* note 51, at 208, 47 Sup. Ct. at 585.

[56] State v. Schaffer, 126 Kan. 607, 270 Pac. 604 (1928).

[57] State v. Troutman, 50 Idaho 673, 677, 299 Pac. 668, 670 (1931).

[58] See Bligh, *Sterilization and Mental Retardation*, 51 A.B.A.J. 1059 (1965); Kalven, *A Special Corner of Civil Liberties*, 31 N.Y.U.L. Rev. 1234 (1965); O'Hara and Sanks, *Eugenic Sterilization*, 45 Geo. L.J. 20 (1956); Zenoff, *Reappraisal of Eugenic Sterilization Laws*, 10 Clev.-Mar. L. Rev. 149 (1961); 38 Ind. L.J. 275 (1963); 35 Iowa L. Rev. 253 (1950).

Somewhat typical of the criticism of Mr. Justice Holmes for his outspoken defense of the eugenic theory as embodied in the Virginia statutes are the comments of Gest in *Justice Holmes v. Natural Law*, 23 Temp. L.Q. 306 (1950): (The decision in *Bell*)" . . . [I]s the product of a juristic philosophy in complete discord with that on which our principles of law are founded. . . . [T]he opinion is noteworthy for the boldness with which Justice Holmes . . . agrees to the subordination of human rights to the supposed expediency of a long range racial improvement."

[59] 316 U.S. 535, 546, 62 Sup. Ct. 1110, 1116 (1942).

sociation issued a report which was critical of the overwhelming emphasis being given to heredity as a cause of feeblemindedness.[60] The volume of scientific criticism of the eugenic theory increased in the following years. Even the most enthusiastic eugenicists began to reduce their earlier claims, and greater attention was paid to environmental factors in programs for racial improvement.[61] Yet the CES statutes have been virtually untouched by these developments. While no new states have adopted CES since 1937, only one state (Kansas) has abandoned the practice.

What are the principal objections to CES as an unreasonable excerise of the police power? They are numerous and detailed, and one who hopes to make a thorough analysis of them must read widely in the numerous journals which contain articles on the relationship of heredity to particular deficiencies.[62] Within the limits of the present article only a superficial summary of these objections can be given.

The first principle on which CES is premised is that human defects are transmitted through inevitable laws of heredity, or as Mr. Justice Holmes expressed it in *Bell v. Buck*— those who "sap the strength of the state . . . (continue) their kind."[63]

The laws of all twenty-five CES states permit the sterilization of mental defectives if there are reasonable grounds for believing that the defect will be transmitted to children. Typically, the operation is required when the person is the ". . . . probable potential parent of socially inadequate offspring"[64] or is a potential producer of ". . . . offspring with inherited inferior or anti-social traits."[65] The problem is this: can a state agency reasonably make

60 Report of the Committee of the American Neurological Association for the Investigation of Eugenical Sterilization; the report is summarized in 1 American J. of Medical Jurisprudence 253 (1938) and analyzed in Myerson, *Certain Medical and Legal Phases of Eugenic Sterilization*, 52 Yale L.J. 618 (1943).

61 When the CES statutes were enacted the eugenicists were so opposed to considering the role of environment in racial improvement that the theory of euthenics was absolutely rejected by them. As late as 1943 Professor Walter Wheeler Cook could pose the choice *Eugenics or Euthenics?* in 37 Ill. L. Rev. 287.

62 Some of the better source materials for such readings will be found in the American Journal of Human Genetics, American J. of Mental Deficiency, Annuals of Eugenics, Eugenics Quarterly, Eugenics Review, J. of Mental Science, J. of Abnormal and Social Psychology, Journal of Heredity, and Science.

63 274 U.S. 200, 208, 47 Sup. Ct. 584, 585 (1925).

64 W. Va. Code ch. 16, § 1394 (1961).

65 N.D. Cent. Code tit. 23 § 0803 (1960).

such a judgment of a mental defective in the light of current scientific knowledge? It is probable that mental deficiency or a tendency to mental disease is inheritable,[66] but the elements and extent of transmissibility is unknown. The once generally accepted view that a single gene in each parent will be responsible for mental condition, an idea based on Mendel's study of vegetable life, is now universally rejected.[67] To the unknown extent that heredity may be the cause of transmission of mental defect and deficiency, hundreds of genetic elements are probably responsible. It may be possible, for example, that two feebleminded parents will probably produce children with a tendency toward feeblemindedness; it may also be impossible, from a genetic point of view, for them to beget such children. But science has not discovered the genetic key which would enable man to know how the process works. Even though heredity may be as important as environment in causing mental defect (which most scientists would dispute) it is impossible to blueprint the hundreds of genetic elements in one parent which would interact with hundreds of genetic elements in the other parent.

It is difficult to see how a board of physicians and civil servants can make even an educated guess as to whether the person whose record is before them will probably be the parent of a mentally defective child. A geneticist would say that such a judgment is impossible; should not the legal community admit that it is at least highly speculative? Can speculation give the state a right to destroy the bodily integrity of its subjects? This question was raised even in reference to voluntary eugenic sterilization by a committee of the American Medical Association in 1937:

66 See 57 American J. of Mental Deficiency 123 (1962).

67 A tendency to manic-depressive insanity may be transmitted by several genes in one parent, but it is certain that environmental stresses must also be present to actualize it. However, it frequently appears only when the person is past the normal years of procreative activity. The extremely rare form of insanity known as Huntington's chorea is caused by a single dominant gene in one parent. In the unknown degree that heredity influences the transmission of other forms of insanity, such as schizophrenia and psychopathic personality, multiple genetic factors in both parents are involved and certain environmental conditions are prerequisite to actual illness.

Among the grades of feeblemindedness, there is even more complexity in genetic contribution than is the case with insanity. The highest type, morons (who are the mental deficients most likely to be born of feebleminded parents), probably have received a tendency toward the condition from multiple genetic factors contributed by both parents. The environmental factor is probably more significant than imbecility and idiocy, but the hereditary factors are extremely complex.

> . . . . Present knowledge regarding human heredity is so limited that there appears to be very little scientific basis to justify limitation of conception for eugenic reasons. . . . There is conflicting evidence regarding the transmissibility of epilepsy and mental disorders.[68]

Under the CES statutes the determining board may usually consider any relevant information in deciding if a particular person is unsuited to procreate. But even if environmental factors are given considerable weight the judgment will still be highly speculative. Not only are environmental factors frequently unknown and unpredictable before conception, they are also the subject of much scientific dispute and contradiction. Is this sufficient to constitute due process of law in a CES order?

Fifteen states permit the forced sterilization of epileptics.[69] It is unquestionable that heredity is sometimes a factor in the transmission of epilepsy, but the probability and form of transmission is impossible to estimate. Human knowledge about the disease would best be described as elementary; at best the judgment of a eugenics board would be extremely speculative in determining that an epileptic person will probably produce an epileptic child.[70]

From the viewpoint of substantive due process the sterilization of criminals on eugenic grounds is indefensible. Sexual perversion or habitual criminality is a social problem; crime has nothing to do with biology. No reputable authority any longer defends the thesis that criminality is inheritable.[71] Nevertheless, eight states allow CES on grounds of criminality.[72]

68 Report of the American Medical Assn.'s Committee to Study Contraceptive Practices, A.M.A. Proc. 54 (May, 1937).

69 Ariz. Code tit. 45, § 243 (1958); Del. Code tit. 16, §§ 5701-5705 (1953); Ga. Code Ann. tit. 99, §§ 1301-1319 (1953); Idaho Code tit. 66, §§ 801-812 (1947); Ind. Stat. Ann. tit. 22, §§ 1601-1618 (Burns 1964); Iowa Code ch. 145, §§ 1-22 (1946); Miss. Code Ann. tit. 25, §§ 6957-6964 (1942); Mont. Rev. Stat. tit. 38, §§ 601-608 (1947); N.H. Rev. Stat. Ann. tit. XII, ch. 174, §§ 1-14 (1955); N.C. Gen. Stat. ch. 35, §§ 35-37 (1949); Okla. Stat. tit. 43a, §§ 341-346 (1951); S.C. Code tit. 32, §§ 671-672 (1962); Utah Code Ann. tit. 64, ch. 10, §§ 1-14 (1953); Va. Code tit. 37, §§ 231-246 (1950); W. Va. Code ch. 16, §§ 1394-1400 (1961).

70 Myoclonic epilepsy is transmissible through heredity. The condition is rare. As to the common forms of the disease heredity is probably a factor in only about one-fourth of the cases. Even then, what is passed is a predisposition due to weaknesses in the nervous system or brain. The predisposition is actualized only under certain environmental conditions. Only a small percentage of epileptics are mentally defective, and in most cases this is due to brain injury rather than any hereditary contribution.

71 Cesare Lombroso popularized the theory of familial criminality in the nineteenth century. The last reputable scholar to support a theory of inherited criminality was the late Professor Ernest Hooton of Harvard University. For an analysis of the reasons

Iowa and South Dakota have a somewhat unusual provision in their CES statutes.[73] They permit the sterilization of syphilitic persons. Although syphilis has nothing to do with genetics these provisions may not be open to a due process objection in the same degree as the mental defects and epileptic classifications discussed above. The probability of the bacterium killing or seriously harming the embryo or fetus may provide a non-speculative and reasonable basis for an order of sterilization.

Georgia allows the sterilization of any person confined in a state institution who has any hereditary physical defect or disease.[74] The reasonableness of such a sweeping classification is at best doubtful.

In a concurring opinion in *Skinner v. Oklahoma,* Mr. Chief Justice Stone expressed the thought that ". . . . the state may protect itself from demonstrably inheritable tendencies of the individual which are injurious to society.[75] Whether the tendencies enumerated in the CES statutes are demonstrably inheritable is obviously critical from a constitutional viewpoint. The overwhelming weight of scientific opinion is that they are not demonstrably inheritable in the case of an individual defective person.

The second principle underlying CES is that defective human beings breed more frequently than normal persons and thus

why such a theory is universally rejected see: Montagu, *The Biologist Looks at Crime,* 27 Annals of the American Academy of Political and Social Science 46 (1941); Montagu, Human Heredity ch. 9 (paperback edition 1960); and Popenoe, *Sterilization and Criminality,* 53 A.B.A. Rep. 575 (1928).

72 Del. Code tit. 16, §§ 5701-5705 (1953); Conn. Gen. Stat. tit. 17, ch. 299, §§ 17-19 (1958); Idaho Code tit. 66, §§ 801-812 (1947); Iowa Code ch. 145, § 1022 (1946); Neb. Rev. Stat. ch. 83, §§ 501-509 (1956); N.D. Cent. Code tit. 23, §§ 0801-0815 (1960); Utah Code Ann. tit. 64, ch. 10, §§ 1-14 (1953).

Although Cal. Pen. Code tit. 1, § 2670 (1960), is part of the Penal Code, and separate from the CES provision found in Cal. Wel. & Inst. Code, § 6624 (1937), that statute is eugenic rather than punitive in form. However, California does have an expressly punitive sterilization statute which applies to those convicted of carnal abuse of a child under ten years of age. Cal. Pen. Code tit. 45, § 645 (1960). Nebraska also has a statute allowing sterilization, in the form of castration, of males convicted of rape, incest, or crimes against nature. Neb. Rev. Stat. ch. 83, § 504 (1956). Although it is not clear from the Oregon Revised Statutes of 1965 if the penal sterilization provision previously found in Ore. Comp. Laws tit. 127, §§ 801-811 has been repealed, no reference to sterilization as a punishment appears in the codification.

73 Iowa Code ch. 145, §§ 1-22 (1946); S.D. Code tit. 30, §§ 0501-0514 (1939).

74 Ga. Code Ann. tit. 99, §§ 1301-1319 (1953). The classification is so broad as to include defects and diseases as asthma, bronchitis, baldness, cataracts, color blindness, congenital heart disease, diabetes, and rickets.

75 316 U.S. 535, 574, 62 Sup. Ct. 1110, 1115 (1942).

threaten to overrun society with inferior offspring. Mr. Justice Holmes described the purpose of CES as being ". . . . to prevent our being swamped with incompetence."[76] Yet the report of the American Neurological Association on eugenic sterilization indicated that ". . . . the reputedly high fecundity of the mentally defective is a myth."[77] Eighty-nine percent of all feebleminded children are born to normal parents,[78] which indicates that even if heredity is assigned a dominant role in producing feeblemindedness the overwhelming number of carriers are not themselves afflicted. Authorities have estimated that even if all persons manifesting the defect were sterilized in each generation it would take centuries or even millenniums to effectuate a substantial reduction in the incidence of even a defect which is primarily caused by hereditary factors.[79] Professor Walter Wheeler Cook has conservatively concluded that ". . . . since sterilization affects very little the reservoir of carriers little progress would be made in reducing the feebleminded in succeeding generations."[80]

The third basic principle of CES is that sterilization is not usually felt to be a detriment by the defective person. Mr. Justice Holmes expressed this belief when he wrote that the loss of reproductive power is ". . . . often not felt to be [a sacrifice] . . . by those concerned."[81] This may be true in the case of many imbeciles, idiots and persons prone to sexual perversion. But it can hardly be generalized of those suffering from feeblemindedness and epilepsy. One recent study indicated that many mental defectives who were forcibly sterilized by the state of California feel resentment.[82] Others are aware that eugenic sterilization is contrary to the teaching of their religion.[83] Some women who are capable of caring for

76 274 U.S. 200, 208, 47 Sup. Ct. 584, 585 (1925).

77 Report of the Committee of the American Neurological Association for the Investigation of Eugenical Sterilization; the report is summarized in 1 American J. of Medical Jurisprudence 253 (1938), and analyzed in Myerson, *Certain Medical and Legal Phases of Eugenic Sterilization*, 52 Yale L.J. 618, 628 (1943).

78 Fisher, *Elimination of Mental Defect*, 18 J. of Heredity 529 (1927).

79 See Montagu, Human Heredity 259 (paperback edition 1960); Scheinfeld, The Basic Facts of Human Heredity 251 (paperback edition 1961); and Cook, *Eugenics or Euthenics?*, 37 Ill. L. Rev. 287 (1943).

80 Cook, *Eugenics or Euthenics?*, 37 Ill. L. Rev. 287, 295 (1943).

81 *Supra* note 76, at 208, 47 Sup. Ct. at 585.

82 Sabagh and Edgerton, *Sterilized Mental Defectives Look at Eugenic Sterilization*, 9 Eugenics Quarterly 215 (1962). Compare Woodside, Sterilization in North Carolina 66 (1950).

83 Jews reject sterilization on theological grounds, especially Deuteronomy 23:2. The

the children of others, but have been forced to undergo CES, can only be described as bitter. The state has precluded their becoming mothers on the basis of ". . . . a knowledge of the laws of heredity far beyond the reaches yet attained by humble scientists."[84]

Any analysis of CES must ultimately reach this fundamental question: is the basis for this state action so apparent and reasonable that the legislature can authorize a substantial intrusion into the body of a human being? Mr. Justice Douglas has stated the seriousness of the answer to that question:

> . . . . We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the existence and survival of the race. There is no redemption for the individual whom the law touches . . . he is forever deprived of a basic liberty.[85]

CES and Procedural Due Process

Is CES a denial of procedural due process? The argument in *Bell v. Buck*[86] centered on equal protection and substantive due process in the exercise of the police powers. The approval of the statute involved in that case forced the opponents of CES to turn to attacks on the procedure under which a sterilization order was entered. In *State v. Schaffer*,[87] it was argued that failure to provide for appeal from the administrative board entering the order was a denial of due process. However, the court held that due process requires neither judicial process nor a right to appeal. No court has reached a contrary conclusion in an actual case, but an advisory opinion given by the Supreme Court of Alabama indicated that the fourteenth amendment of the Constitution of the United States requires that a person who has been ordered to submit to CES have ". . . . an untrammeled right to appeal to a court."[88]

Nazi use of CES has strengthened Jewish opposition; see the comments of Rabbi Rackman, *A Jewish View*, 31 N.Y.U.L. Rev. 1210 (1956). A few Catholic theologians at one time defended CES; see Lehane, The Morality of American Civil Legislation Concerning Eugenical Sterilization (1944), for a discussion of these writers. Eventually Catholic opinion became unanimous against CES and in 1931 Pope Pius XI condemned the practice. Some Protestant theologians have defended CES; some oppose it. The Lambeth Conference of 1958 (Anglican), which has had a worldwide impact on Protestant thinking about conception control condemned CES.

84 Deutsch, The Mentally Ill in America 375 (2d edition 1949).

85 Skinner v. Oklahoma, 316 U.S. 535, 541, 62 Sup. Ct. 1110, 1113 (1942).

86 274 U.S. 200, 47 Sup. Ct. 584 (1925).

87 126 Kan. 607, 270 Pac. 604 (1928).

88 *In re* Opinion of the Justices, 230 Ala. 543, 551, 162 So. 123, 128 (1935).

Currently four CES states have no provision for appeal to a judicial body.[89] The remaining twenty-one CES states allow an appeal to the county court, with the right to prosecute the appeal to the supreme court of the state. Arizona, Georgia, Montana and North Dakota require a trial de novo in the county court.[90] In seventeen states the county court would presumably be limited to reviewing the action of the administrative board.

No case has involved a challenge to the competence of the agency empowered to issue the order of sterilization. In Michigan and Indiana a court can issue the order under certain circumstances.[91] Other agencies empowered to issue the original order are state boards of eugenics created expressly for the purpose,[92] governing boards of the institution in which the defective person is confined,[93] boards of medical examiners,[94] superintendents of institutions,[95] special boards appointed to hear the specific case,[96] state departments of health,[97] a state welfare department,[98] and the board of commissioners of the county in which the defective person lives.[99]

The competence of a court to order a eugenic sterilization in a state which does not have a CES statute was raised in one reported case, *In Re Simpson*.[100] Nora Ann Simpson was an attractive eighteen year old girl who appeared normal at first sight. However,

89 Ala. Code tit. 45, § 243 (1958); Conn. Gen. Stat. tit. 17, ch. 299, §§ 17-19 (1958); Del. Code tit. 16, §§ 5701-5705 (1953); Wis. Stat. Ann. tit. VII, ch. 46, § 12 (1923).

90 In Georgia and Montana there is a right to a jury trial.

91 Ind. Stat. Ann. tit. 22, §§ 1601-1618 (Burns 1964), permits the judge who commits a person to a mental institution to order him sterilized. Mich. Comp. Laws ch. 720, §§ 301-310 (1948).

92 Ga. Code Ann. tit. 99, §§ 1301-1319 (1953); Idaho Code tit. 66, §§ 801-812 (1947); Iowa Code ch. 145, §§ 1-22 (1946); Mont. Rev. Code tit. 38, §§ 601-608 (1947); N.C. Gen. Stat. ch. 35, §§ 35-57 (1949); Ore. Rev. Stat. tit. 36, ch. 436, §§ 010-150 (1965).

93 Miss. Code Ann. tit. 25, §§ 6957-6964 (1942); N.H. Rev. Stat. Ann. tit. XII, ch. 174, §§ 1-14 (1955); Utah Code Ann. tit. 64, ch. 10, §§ 1-14 (1953).

94 Ariz. Code tit. 36, §§ 531-540 (1956); Neb. Rev. Stat. ch. 83, §§ 501-509 (1956); N.D. Cent. Code tit. 23, §§ 0801-0815 (1960).

95 Ala. Code tit. 45, § 243 (1958).

96 Conn. Gen. Stat. tit. 17, ch. 299, §§ 17-19 (1958); Del. Code tit. 16, §§ 5701-5705 (1953).

97 Cal. Wel. & Inst. Code, § 6624 (1937); Ind. Stat. Ann. tit. 22, §§ 1601-1618 (Burns 1964); Me. Rev. Stat. tit. 34, §§ 2461-2468 (1964); Okla. Stat. tit. 43a, §§ 341-346 (1951); (Bd. of Mental Health); S.C. Code tit. 32, §§ 671-672 (1962); Va. Code tit. 37, §§ 231-246 (1950), (Hospital Board); W. Va. Code ch. 16, §§ 1394-1400 (1961).

98 Wis. Stat. Ann. tit. VII, ch. 46, § 12 (1923).

99 S.D. Code tit. 30, §§ 0501-0514 (1939).

100 180 N.E.2d 206 (1962), noted in 61 Mich. L. Rev. 1359 (1963).

she had an I.Q. of 36. She had given birth to one illegitimate child. A petition was filed with the Probate Court of Zanseville County, Ohio, requesting her confinement to a state mental institution, but there were no vacancies. Her mother then requested the Judge to order her sterilization. The Judge granted the petition on the theory that the statute giving probate courts plenary power to provide care for the feebleminded, in consideration of the good of society, gave him the right to order a eugenic sterilization. The opinion of the court also asserted general equity jurisdiction to order such a sterilization.[101] A situation of this kind has never reached an appellate court.

The one successful constitutional challenge to the procedure followed under a CES statute has been based on the failure to provide for notice and contest. In *Brewer v. Valk*,[102] the Supreme Court of North Carolina held this omission fatal to the statute. In *In Re Hendrickson*,[103] the father of an insane boy who had been ordered sterilized protested the order. An injunction was issued restraining a vasectomy. The Supreme Court of Washington affirmed the issuance of the injunction on the theory that a failure to provide notice and a right of contest before the administrative board was a denial of due process. The right to appeal to a court after the issuance of the order did not save the statute. A contrary result was reached in *Garcia v. State Dep't of Institutions*,[104] where the Supreme Court of California held that a CES statute did not withhold due process by failing to provide for notice, contest, or appeal. The court gave no reasons for its decision.

Conclusion

At Nuremberg, American judges condemned the Nazi use of the German CES laws to eliminate "undesirable" characteristics

101 No authorities specifically in point were cited to support the claim that the statute gave the probate court power to sterilize. The court cited an unreported Maryland case, *Ex Parte Eaton*, Baltimore Circuit Court, Nov. 10, 1954, as authority for the proposition that power to order a eugenic sterilization is implicit in equity jurisdiction. However, there is no historical basis for such power. The king entrusted the chancellor with the care of lunatics, but this was probably a delegation of the king's personal responsibility to his advisor; the equity court over which the chancellor presided never exerted general power over the lives of lunatics. In *Beall v. Smith*, 10 Ch. 85 (1873), the Court of Chancery held that there was no general equity jurisdiction over the affairs of incompetents.

102 204 N.C. 186, 167 S.E. 638 (1933).

103 12 Wash. 2d 600, 123 P.2d 322 (1942).

104 36 Cal. App. 2d 152, 97 P.2d 264 (1939).

from the race, but it was the American states which had "pioneered" the use of CES. The law is only as strong as the protection which it gives to its weakest subjects. Viewed by the standards of the Constitution of the United States, twenty-five states retain laws which are open to gross abuse of the rights of the most dependent and weakest citizens. It is no consolation to the legal community that CES is less frequently used today than it was two decades ago. This is less than consoling to the imprisoned, feebleminded, insane or epileptic citizen who will this year lose his right to have children on the basis of a disputed theory. The legislatures of CES states should admit that this is the one instance in which the wisdom of the common law and the experience of the centuries were ignored in an attempt to force "scientific" thinking into the law. Respect for Mr. Justice Holmes must not prevent the courts from admitting the fallacious absurdity of his reasoning in *Bell v. Buck*. Our science, our common sense, but most importantly our Constitution demand an end to CES in the United States.